IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION This Document Relates to: *Shubert v. Bush*, Case No. 07-693	)	MDL Dkt. No. 06-1791-VRW **PUBLIC DECLARATION OF LT. GEN. KEITH B. ALEXANDER, DIRECTOR, NATIONAL SECURITY AGENCY** Hon. Vaughn R. Walker

PUBLIC DECLARATION OF LIEUTENANT GENERAL KEITH B. ALEXANDER, DIRECTOR, NATIONAL SECURITY AGENCY

I, Lieutenant General Keith B. Alexander, do hereby state and declare as follows:

INTRODUCTION

1. I am the Director of the National Security Agency (NSA), an intelligence agency within the Department of Defense. I am responsible for directing the NSA, overseeing the operations undertaken to carry out its mission and, by specific charge of the President and the Director of National Intelligence, protecting NSA activities and intelligence sources and methods. I have been designated an original TOP SECRET classification authority under Executive Order No. 12958, 60 Fed. Reg. 19825 (1995), as amended on March 25, 2003, and Department of Defense Directive No. 5200.1-R, Information Security Program Regulation, 32 C.F.R. § 159a.12 (2000).

2. The purpose of this declaration is to support an assertion of the military and state secrets privilege (hereafter "state secrets privilege") by the Director of National Intelligence (DNI) as the head of the intelligence community (as well as the statutory privilege assertion by the DNI under 50 U.S.C. § 403-1(i)(1)). In addition, through this declaration, I also hereby invoke and assert the NSA's statutory privilege set forth in section 6 of the National Security

Agency Act of 1959, Public Law No. 86-36 (codified as a note to 50 U.S.C. § 402) ("NSA Act"), to protect the information related to NSA activities described below. The statements made herein are based on my personal knowledge of NSA activities and operations, and on information available to me as Director of the NSA.

3. In the course of my official duties, I have been advised of this litigation and the allegations in the Plaintiffs' Amended Complaint. As summarized herein and described further in my classified declaration submitted for the Court's *in camera*, *ex parte* review, various classified facts related to the Plaintiffs' claims are subject to the DNI's state secrets and statutory privilege assertions, as well as to my assertion of the NSA's statutory privilege. The disclosure of this information, which relates to NSA intelligence information, activities, sources, and methods, reasonably could be expected to cause exceptionally grave damage to the national security of the United States. Accordingly, as set forth further below and in my classified declaration, it is my judgment that information described in these declarations should be protected from disclosure. In addition, it is my judgment that sensitive state secrets are so central to the subject matter of the litigation that any attempt to proceed in the case risks the disclosure of the secrets described herein and in my classified declaration and, thus, exceptionally grave damage to the national security of the United States.

BACKGROUND

A. The National Security Agency

4. The NSA was established by Presidential Directive in 1952 as a separately organized agency within the Department of Defense. Under Executive Order 12333, § 1.12(b), as amended, the NSA's cryptologic mission includes three functions: (1) to collect, process, and disseminate signals intelligence (SIGINT) information, of which COMINT is a significant subset, for (a) national foreign intelligence purposes, (b) counterintelligence purposes, and (c)

the support of military operations; (2) to conduct information security activities; and (3) to conduct operations security training for the U.S. Government.

5. There are two primary reasons for gathering and analyzing foreign intelligence information. The first, and most important, is to gain information required to direct U.S. resources as necessary to counter external threats. The second reason is to obtain information necessary to the formulation of U.S. foreign policy. Foreign intelligence information provided by the NSA is thus relevant to a wide range of important issues, including military order of battle; threat warnings and readiness; arms proliferation; international terrorism; and foreign aspects of international narcotics trafficking.

B. September 11, 2001 and the al Qaeda Threat.

6. On September 11, 2001, the al Qaeda terrorist network launched a set of coordinated attacks along the East Coast of the United States. Four commercial jetliners, each carefully selected to be fully loaded with fuel for a transcontinental flight, were hijacked by al Qaeda operatives. Those operatives targeted the Nation's financial center in New York with two of the jetliners, which they deliberately flew into the Twin Towers of the World Trade Center. Al Qaeda targeted the headquarters of the Nation's Armed Forces, the Pentagon, with the third jetliner. Al Qaeda operatives were apparently headed toward Washington, D.C. with the fourth jetliner when passengers struggled with the hijackers and the plane crashed in Shanksville, Pennsylvania. The intended target of this fourth jetliner was most evidently the White House or the Capitol, strongly suggesting that al Qaeda's intended mission was to strike a decapitation blow to the Government of the United States—to kill the President, the Vice President, or Members of Congress. The attacks of September 11 resulted in approximately 3,000 deaths—the highest single-day death toll from hostile foreign attacks in the Nation's history. In addition,

these attacks shut down air travel in the United States, disrupted the Nation's financial markets and government operations, and caused billions of dollars of damage to the economy.

7. On September 14, 2001, the President declared a national emergency "by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States." Proclamation No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001). The United States also immediately began plans for a military response directed at al Qaeda's training grounds and haven in Afghanistan. On September 14, 2001, both Houses of Congress passed a Joint Resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11. Authorization for Use of Military Force, Pub. L. No. 107-40 § 21(a), 115 Stat. 224, 224 (Sept. 18, 2001) ("Cong. Auth."). Congress also expressly acknowledged that the attacks rendered it "necessary and appropriate" for the United States to exercise its right "to protect United States citizens both at home and abroad," and acknowledged in particular that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Id.* pmbl.

8. As the President made clear at the time, the attacks of September 11 "created a state of armed conflict." Military Order, § 1(a), 66 Fed. Reg. 57833, 57833 (Nov. 13, 2001). Indeed, shortly after the attacks, NATO took the unprecedented step of invoking article 5 of the North Atlantic Treaty, which provides that an "armed attack against one or more of [the parties] shall be considered an attack against them all." North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246. The President also determined that al Qaeda terrorists "possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and

massive destruction of property, and may place at risk the continuity of the operations of the United States Government," and he concluded that "an extraordinary emergency exists for national defense purposes." Military Order, § 1(c), (g), 66 Fed. Reg. at 57833-34.

9. As a result of the unprecedented attacks of September 11, 2001, the United States found itself immediately propelled into a worldwide war against a network of terrorist groups, centered on and affiliated with al Qaeda, that possesses the evolving capability and intention of inflicting further catastrophic attacks on the United States. That war is continuing today, at home as well as abroad. Moreover, the war against al Qaeda and its allies is a very different kind of war, against a very different enemy, than any other war or enemy the Nation has previously faced. Al Qaeda and its supporters operate not as a traditional nation-state but as a diffuse, decentralized global network of individuals, cells, and loosely associated, often disparate groups, that act sometimes in concert, sometimes independently, and sometimes in the United States, but always in secret—and their mission is to destroy lives and to disrupt a way of life through terrorist acts. Al Qaeda works in the shadows; secrecy is essential to al Qaeda's success in plotting and executing its terrorist attacks.

10. Accordingly, after the September 11 attacks, the President directed the NSA to detect and prevent al Qaeda-related terrorist attacks within the United States by intercepting the content[1] of telephone and Internet communications for which there were reasonable grounds to believe that (1) such communication originated or terminated outside the United States, and (2) a party to such communication was a member or agent of al Qaeda or an affiliated terrorist

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[1] The term "content" is used herein to refer to the substance, meaning, or purport of a communication, as defined in 18 U.S.C. § 2510(8).

organization (hereafter referred to as the "Terrorist Surveillance Program" or "TSP"). The President acknowledged the existence of this program in December 2005.[2]

INFORMATION SUBJECT TO ASSERTIONS OF PRIVILEGE

11. I understand that the Plaintiffs in this lawsuit allege that the NSA conducts a "dragnet" surveillance program involving the interception of "virtually every telephone, internet and/or email communication that has been sent from or received within the United States since 2001." Amended Compl. ¶¶ 1, 4. I also understand that the Plaintiffs allege that the content of their own telephone and Internet communications were subject to "unlawful interception, search and seizure, and electronic surveillance," in connection with the alleged "dragnet" program. *Id.* ¶ 87. I further understand that the Plaintiffs allege (1) that they are customers of Verizon and/or AT&T, and (2) that those companies participate in the content surveillance dragnet that Plaintiffs allege. *See id.* ¶¶ 5-8.

12. As set forth further below, the following categories of information are subject to the DNI's assertion of the state secrets and statutory privileges, as well as my assertion of the NSA statutory privilege, and this information should be protected from disclosure in this matter:

A. Information that may tend to confirm or deny whether the Plaintiffs have been subject to any alleged NSA intelligence activity that may be at issue in this matter; and

B. Information concerning NSA intelligence activities, sources, or methods, including:

[2] On January 17, 2007, the Attorney General made public the general facts that new orders of the Foreign Intelligence Surveillance Court had been issued that authorized the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization; that, as a result of these orders, any electronic surveillance that was occurring as part of the TSP is now being conducted subject to the approval of the FISA Court; and that, under these circumstances, the President determined not to reauthorize the TSP.

(1) Information concerning the scope and operation of the Terrorist Surveillance Program, including information that may be needed to demonstrate that the TSP was limited to one-end foreign al Qaeda-related communications and that the NSA does not otherwise engage in the content surveillance dragnet that the Plaintiffs allege; and

(2) Any other information concerning NSA intelligence activities, sources, or methods that would be necessary to adjudicate the Plaintiffs' claims, including, to the extent applicable, information that would tend to confirm or deny whether the NSA collects large quantities of communication records information; and

C. Information that may tend to confirm or deny whether Verizon/MCI, AT&T, or any other telecommunications carrier has assisted the NSA with the alleged intelligence activities.

HARM OF DISCLOSURE

13. As set forth in my classified declaration submitted for the Court's *in camera*, *ex parte* review, disclosure of information in the foregoing categories would cause exceptionally grave harm to national security. I briefly summarize the harms at issue below.

14. The first major category of information as to which I am supporting the DNI's assertion of privilege, and asserting the NSA's own statutory privilege, concerns information as to whether particular individuals, including the Plaintiffs in this lawsuit, have been subject to alleged NSA intelligence activities. Disclosure of information that would tend to confirm or deny whether or not certain individuals have been subject to NSA intelligence activities would cause exceptionally grave harm to the national security. As a matter of course, the NSA cannot publicly confirm or deny whether any individual is subject to surveillance activities because to do so would tend to reveal actual targets. For example, if the NSA were to confirm in this case and others that specific individuals are not targets of surveillance, but later refuse to comment (as it would have to) in a case involving an actual target, a person could easily deduce by comparing such responses that the person in the latter case is a target. The harm of revealing targets of

foreign intelligence surveillance should be obvious. If an individual knows or suspects he is a target of U.S. intelligence activities, he would naturally tend to alter his behavior to take new precautions against surveillance. In addition, revealing who is not a target would indicate who has avoided surveillance and who may be a secure channel for communication. Such information could lead a person, secure in the knowledge that he is not under surveillance, to help a hostile foreign adversary convey information; alternatively, such a person may be unwittingly utilized or even forced to convey information through a secure channel. Revealing which channels are free from surveillance and which are not would also reveal sensitive intelligence methods and thereby could help any adversary evade detection.

15. Second, I am supporting the DNI's assertion of privilege and asserting the NSA's statutory privilege over any other facts concerning NSA intelligence sources and methods that would be needed to adjudicate this case. This includes: (1) facts concerning the operation of the Terrorist Surveillance Program and any other NSA intelligence activities needed to demonstrate that the TSP was limited as the President stated to the interception of one-end foreign communications reasonably believed to involve a member or agent of al Qaeda or an affiliated terrorist organization and that the NSA does not otherwise conduct the content surveillance dragnet that the Plaintiffs allege; (2) other classified facts about the operation of the TSP that would be necessary to adjudicate the lawfulness of that program, to the extent it is at issue in this case; and (3) to the extent applicable, facts that would confirm or deny whether the NSA collects large quantities of communication records information. As set forth below, the disclosure of such information would cause exceptionally grave harm to national security.

16. As noted above, in December 2005, President Bush explained that, after the September 11 attacks, he authorized the NSA to intercept the content of certain communications for which there are reasonable grounds to believe that (1) such communication originated or

terminated outside the United States, and (2) a party to such communication is a member or agent of al Qaeda or an affiliated terrorist organization. The President stated at the time that this activity, now referred to as the Terrorist Surveillance Program, did not involve the collection of purely domestic communications, or international communications with no al Qaeda connection, and these facts were reiterated publicly by the Attorney General and then-Deputy Director of National Intelligence. As the President made clear in describing the limited scope of the TSP, Plaintiffs' allegations of a content surveillance dragnet are false. But if the NSA had to demonstrate in this case that the TSP was limited as the President stated, and not a dragnet as the Plaintiffs claim, and that the NSA does not otherwise engage in the dragnet that Plaintiffs allege, sensitive and classified facts about the operation of the TSP and NSA intelligence activities would have to be disclosed. The disclosure of whether and to what extent the NSA utilizes certain intelligence sources and methods would reveal to foreign adversaries the NSA's capabilities, or lack thereof, enabling them to either evade particular channels of communications that are being monitored, or exploit channels of communications that are not subject to NSA activities, in either case risking exceptionally grave harm to national security.

17. Similarly, confirmation or denial of any information concerning whether the NSA collects large quantities of communication records—to the extent such allegations are relevant to this case—would also disclose information about whether or not the NSA utilizes particular intelligence sources and methods and, thus, the NSA's capabilities or lack thereof.

18. Finally, disclosure of any information tending to confirm or deny whether Verizon or AT&T assists the NSA with alleged intelligence activities as Plaintiffs claim would cause exceptionally grave harm to the national security. Again, such disclosures would help foreign adversaries evade detection by revealing whether or not the NSA utilizes particular intelligence sources and methods or monitors particular channels of communications.

19. Any further elaboration on the public record concerning these matters would reveal information that would cause the very harm that my privilege assertion and the DNI's privilege assertion are intended to prevent. As noted, my separate classified declaration provides a more detailed explanation of the information and harms to national security at issue.

CONCLUSION

20. In sum, I support the DNI's assertion of the state secrets privilege and statutory privilege to prevent the disclosure of the information described herein and detailed in my classified declaration that is available for the Court's *in camera* and *ex parte* review. I also assert a statutory privilege under Section 6 of the National Security Act with respect to the information described herein which concerns the functions of the NSA. Moreover, because proceedings in this case risk disclosure of privileged and classified intelligence-related information, I respectfully request that the Court not only protect that information from disclosure but also dismiss this case to prevent exceptional harm to the national security of the United States.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: 25 May 2007

LT. GEN. KEITH B. ALEXANDER
Director, National Security Agency